FILED MARCH 25, 2011

STATE BAR COURT OF CALIFORNIA

HEARING DEPARTMENT – LOS ANGELES

In the Matter of **JAMES CHESTER WESEMAN** **Member No. 106684** A Member of the State Bar.	)	Case No.: **10-J-07366** **DECISION**

I. INTRODUCTION

By order filed on June 1, 2010, respondent James Chester Weseman was disciplined by the United States Patent and Trademark Office (USPTO). As a result, the State Bar of California initiated this proceeding. (Bus. & Prof. Code, § 6049.1;[1] Rules Proc. of State Bar, rules 620-625.) The Office of the Chief Trial Counsel of the State Bar of California (State Bar) was represented by Kimberly J. Belvedere. Respondent did not appear in person or by counsel.

The issues in this proceeding are limited to: (1) the degree of discipline to be imposed upon respondent in California; (2) whether, as a matter of law, respondent's culpability in the proceeding would not warrant the imposition of discipline in California under the laws or rules applicable in California at the time of respondent's misconduct before the USPTO; and (3)

[1]Unless otherwise noted, all statutory references are to this code.

whether the USPTO proceeding lacked fundamental constitutional protection. (Section 6049.1(b).)

Respondent bears the burden of establishing that the conduct for which he was disciplined by the USPTO would not warrant the imposition of discipline in California and/or that the USPTO proceedings lacked fundamental constitutional protection. Unless respondent establishes one or both of these, the record of discipline in the USPTO proceeding is conclusive evidence of culpability of misconduct in California. (Section 6049.1(a) & (b).) Since respondent did not participate in this proceeding, the court focuses on the degree of discipline to be imposed.

For the reasons indicated below, the court recommends, among other things, that respondent be actually suspended for 90 days and until he complies with rule 205, Rules Proc. of State Bar, among other things.

II. SIGNIFICANT PROCEDURAL HISTORY

The Notice of Disciplinary Charges (NDC) was filed on October 18, 2010, and was properly served on respondent on that same date at his official membership records address by certified mail, return receipt requested, as provided in Business and Professions Code section 6002.1(c) (official address). Service was deemed complete as of the time of mailing. (*Lydon v. State Bar* (1988) 45 Cal.3d 1181, 1186.) The website for the United States Postal Service indicates that this correspondence was unclaimed, although it had not been returned to the State Bar as yet.

On October 22, 2010, a notice scheduling a status conference for November 16, 2010, was properly served at respondent's official address. Respondent did not participate in the status conference. A copy of the status conference order was properly served on respondent at his official address on November 17, 2010.

Respondent did not file a responsive pleading. On November 23, 2010, a motion for entry of default was properly served on respondent at his official address by certified mail, return receipt requested. It advised him that, if he was found culpable, minimum discipline consisting of actual suspension for 90 days and until he complied with rule 205, Rules Proc. of State Bar would be sought. He did not respond to the motion.

On December 17, 2010, the court entered respondent's default and enrolled him inactive effective three days after service of the order. The order was properly served on him at his official address on that same date by certified mail, return receipt requested. It was returned to the court as undeliverable, marked "Return to sender. No mail receptacle. Unable to forward."

The State Bar's other attempts to locate and contact respondent were fruitless. This included contacting respondent's last known employer as well as calling and sending correspondence to possible telephone numbers, email and street addresses for him. The court concludes that respondent was given sufficient notice of the pendency of this proceeding, including notice by certified mail and by regular mail, to satisfy the requirements of due process. (*Jones v. Flowers, et al.* (2006) 547 U.S. 220, 126 S.Ct. 1708, 164 L.Ed.2d 415.)

The matter was submitted for decision without hearing on January 5, 2011.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Jurisdiction

Respondent was admitted to the practice of law in California on December 14, 1982, and has been a member of the State Bar at all times since.

B. Facts

Business and Professions Code section 6049.1(a) provides, in pertinent part, that a certified copy of a final order by any court of record of any state of the United States, determining that a member of the State Bar committed professional misconduct in that

jurisdiction shall be conclusive evidence that the member is culpable of professional conduct in this state.

The court admits into evidence the certified record of the disciplinary proceedings before the USPTO, a copy of which was attached to the NDC as Exhibit 1. The court judicially notices the applicable ethics rules attached to the NDC as Exhibit 2.

Respondent was registered as a patent attorney before the USPTO on February 25, 1991. He had been registered as a patent agent since December 15, 1981.

The record of the proceeding conclusively establishes that the USPTO disciplined respondent by order issued on June 1, 2010 (effective July 1, 2010) by suspending him from practice before the USPTO for 120 days for violations of 37 C.F.R. § 10.23(b)(5) (engaging in conduct prejudicial to the administration of justice) on the basis of the following facts:

On December 13, 2004, the USPTO mailed respondent a Notice of Allowance and Issue Fee, specifying a three-month response period for the payment of the fee in connection with patent applications.

On March 18, 2005, in response to the Notice of Allowance and Issue Fee in connection with patent application no. 10/117,457, respondent caused to be submitted to the USPTO check no. 1573, drawn from a Bank of America account of "Lillian M. Montano" in the amount of $730.00, and bearing the purported signature of Lillian M. Montano. Check no. 1573 was returned for insufficient funds, a fact known to him since at least March 9, 2009. The patent was issued despite the returned check. Respondent did not make good on the check or the returned check processing fee or remedy the abandonment of the application that occurred by operation of 35 U.S.C. §151. Accordingly, there is a cloud on the enforceability of this patent.

On March 1, 2006, in response to the Notice to File Missing Parts of Application in connection with patent application no. 10/531,106, respondent signed and caused to be submitted to the USPTO check no. 8911, drawn from a California Bank & Trust account of "James C. Weseman, A Professional Corporation" in the amount of $795.00, and bearing the purported signature of respondent. Check no. 8911 was returned for insufficient funds. Respondent was notified by the USPTO in writing on July 17 and September 26, 2006, October 5, 2007 and March 9, 2009 that it was returned for insufficient funds. Respondent did not complete the payments in connection with this patent application despite receiving notice. Respondent has not made good on the check or the check processing fee. Accordingly, the patent application is considered abandoned by operation of law.

On July 15, 2002, in connection with a request for continued examination of patent application no. 09/636,119, respondent caused to be submitted to the USPTO check no. 4676, drawn from the bank account of "Ignacio R. Montano and Lillian M. Montano" in the amount of $730.00, and bearing the purported signature of Lillian M. Montano. Check no. 4676 was returned for insufficient funds. The USPTO did not find culpability based on the return of this check as it occurred more than five years before that disciplinary action was commenced and, therefore, was time-barred by the statute of limitations. (28 U.S.C. §2462.)

As an experienced patent practitioner, respondent knew or reasonably should have known that USPTO charges patent fees and that those fees are to be paid in advance in accordance with 35 U.S.C. §151 and 37 C.F.R. §1.22.

As an experienced patent practitioner, respondent knew or reasonably should have known of potential adverse consequences to his clients' intellectual property rights, including the abandonment of his client's patent applications, when required payments are not made to the USPTO.

The USPTO suspended respondent for 120 days, noting, among other things, that respondent had defaulted in its disciplinary proceedings and that he had violated his duties to the public, the legal system, the profession, if not also to his clients. It acknowledged the actual or potential harm cause by the misconduct involves not only the waste of government resources in processing patent applications for which the fees were unpaid but also the resources expended in attempting to secure payment of the fees from respondent and in pursuing the disciplinary action. The USPTO noted that respondent had an extensive patent practice for almost 30 years; the misconduct only involved two checks issued four and five years ago (at the time); the checks were not issued for his personal benefit; and there was no evidence of misuse of client funds.

C. Legal Conclusions

1. Count 1 - Rule of Professional Conduct,[2] Rule 3-110(A) (Competence)

Rule 3-110(A) prohibits an attorney from intentionally, recklessly or repeatedly failing to perform legal services competently.

By presenting two bad checks to the USPTO in connection with patent applications that respondent was prosecuting and not making good on those checks despite notice of insufficient funds, respondent intentionally, recklessly or repeatedly did not perform competently in wilful violation of rule 3-110(A).

2. Count 2 - Rule 3-700(A)(2) (Improper Withdrawal from Representation)

Rule 3-700(A)(2) prohibits an attorney from withdrawing from employment until he or she has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of a client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D) and with other applicable laws and rules.

[2]Future references to rule are to this source.

By presenting two bad checks to the USPTO in connection with patent applications that respondent was prosecuting and by not making good on those checks despite notice of insufficient funds, resulting in the abandonment of a patent applications and a cloud on the enforceability of another, respondent effectively withdrew from employment, which prejudiced the clients. Accordingly, respondent did not take reasonable steps to avoid reasonably foreseeable prejudice to the clients in wilful violation of rule 3-700(A)(2).

3. Section 6106 (Moral Turpitude)

Section 6106 makes it a cause for disbarment or suspension to commit any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not.

There is not clear and convincing evidence that respondent violated section 6106 by engaging in acts of moral turpitude, namely, presenting two bad checks to the USPTO in connection with patent applications that respondent was prosecuting and not making good on those checks despite notice of insufficient funds. This is the same factual basis supporting the rule 3-100(A) charge and does not rise to the level of moral turpitude.

IV. LEVEL OF DISCIPLINE

A. Mitigation

Since respondent did not participate in these or the USPTO disciplinary proceedings, no mitigating evidence was presented and the court could glean no mitigating factors other than respondent's more than 22 years of discipline-free conduct prior to the commencement of the misconduct, a significant mitigating factor. (Standard 1.2(e)(i), Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct[3].)

[3]Future references to standard or std. are to this source.

B. Aggravation

Respondent's lack of participation prior to the entry of default in this proceeding is an aggravating circumstance. The court notes that he also did not participate in the USPTO disciplinary proceedings. (Std. 1.2(b)(vi).)

Respondent's misconduct significantly harmed a client, the public or the administration of justice. (Standard 1.2(b)(iv).) The USPTO acknowledged the actual or potential harm caused by the misconduct involves not only the waste of government resources in processing patent applications for which the fees were unpaid but also the resources expended in attempting to secure payment of the fees from respondent and in pursuing the disciplinary action.

C. Discussion

The primary purposes of attorney disciplinary proceedings are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (Standard 1.3; *Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

Standard 1.6(b) provides that the appropriate sanction for the misconduct must be balanced with any mitigating or aggravating circumstances, with due regard for the purposes of imposing discipline. If two or more acts of professional misconduct are found in a single disciplinary proceeding and different sanctions are prescribed by the standards for those acts, the sanction recommended shall be the most severe. The standards, however, are only guidelines and do not mandate the discipline to be imposed. (*In the Matter of Moriarty* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 245, 250-251.) "[E]ach case must be resolved on its own particular facts and not by application of rigid standards." (*Id.* at p. 251.)

Standards 2.4(b) and 2.10 apply. They both recommend reproval or suspension.

The State Bar seeks, among other things, 90 days' actual suspension. This court agrees.

Respondent has been found culpable of not performing competently and abandonment in two client matters. In aggravation, the court considered respondent's lack of participation in the USPTO and these proceedings prior to the entry of default as well as harm to the public and to the administration of justice. Respondent's more than 22 years of discipline-free practice is a significant mitigating factor.

The court found instructive *King v. State Bar* (1990) 52 Cal.3d 307. In *King*, the Supreme Court actually suspended the attorney for 90 days with a four-year stayed suspension and probation. In two client matters, he was found culpable of not performing or returning client files and improperly withdrawing from a case. Aggravating factors included causing substantial harm to one client who had lost his personal injury action due to the attorney's inaction as well as indifference and lack of insight. He had no prior record of discipline in 14 years of practice. Respondent participated in the proceedings. *King* presents more misconduct than the present matter and, unlike the present case, respondent participated in that proceeding.

In light of the foregoing, the court believes that actual suspension for 90 days and until respondent complies with rule 205, Rules Proc. of State Bar, is sufficient to protect the public in this instance.

V. DISCIPLINE RECOMMENDATION

Accordingly, it is hereby recommended that respondent James Chester Weseman be suspended from the practice of law for two years; that said suspension be stayed; and that he be actually suspended from the practice of law for 90 days and until the State Bar Court grants a motion to terminate respondent's actual suspension at its conclusion or upon such later date ordered by the court. (Rule 205(a), (c), Rules Proc. of State Bar.)

It is also recommended that he be ordered to comply with the conditions of probation, if any, hereinafter imposed by the State Bar Court as a condition for terminating his actual suspension.

If the period of actual suspension reaches or exceeds two years, it is further recommended that respondent remain actually suspended until he has shown proof satisfactory to the State Bar Court of rehabilitation, fitness to practice, and learning and ability in the general law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct. (See also, rule 205(b).)

It is also recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court within 30 calendar days of the effective date of the Supreme Court order in this matter, and file the affidavit provided for in paragraph (c) within 40 days of the effective date of the order showing his compliance with said order.[4]

It is further recommended that respondent take and pass the Multistate Professional Responsibility Examination (MPRE) administered by the National Conference of Bar Examiners, Multistate Professional Responsibility Examination Application Department, P.O. Box 4001, Iowa City, Iowa, 52243, (telephone 319-337-1287) and provide proof of passage to the State Bar Office of Probation within one year of the effective date of the discipline herein or during the period of his actual suspension, whichever is longer. Failure to pass the Multistate Professional Responsibility Examination within the specified time results in actual suspension by the Review Department, without further hearing, until passage. But see rule 9.10(b), California Rules of Court, and rule 321(a)(1) and (3), Rules of Procedure of the State Bar.

[4]Failure to comply with rule 9.20 could result in disbarment. (*Bercovich v. State Bar* (1990) 50 Cal.3d 116, 131.) Respondent is required to file a rule 9.20(c) affidavit even if he has no clients to notify. (*Powers v. State Bar* (1988) 44 Cal.3d 337, 341.)

VI. COSTS

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: March 25, 2011.

RICHARD A. PLATEL
Judge of the State Bar Court